UNITED STATES
v.
RICHARD G. CLEMANS ET AL.

IBLA 78-574 Decided January 17, 1980

Appeal from a decision of Robert W. Mesch, Administrative Law Judge, holding six lode mining claims null and void. (Arizona Contest 9845).

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Withdrawn Land

When land is withdrawn from all forms of entry, location, and exploration subsequent to location of a mining claim, the validity of such claim cannot be recognized unless (1) it was perfected by a discovery at the time of withdrawal, and (2) it has been continuously supported by the same discovery to the present; that is, at the time of the hearing.

2. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Res Judicata

A decision in 1959 withdrawing charges of lack of discovery is not res judicata as to subsequent inquiry. The earlier decision merely established that claimants' possessory interest in claims had not been extinguished by Act of May 27, 1955, 69 Stat. 67, withdrawing lands from all forms of mining activity. Unless and until patent issues, title to the claims in controversy remains in the United States, and it may inquire into the extent and validity of rights claimed against it.

3. Mining Claims: Contests

When the Government contests the validity of a mining claim, it has only the burden of establishing a prima facie case; the burden then shifts to the contestee, who is proponent of a claim or right against the United States, to adduce evidence which by a preponderance affirmatively demonstrates the validity of the claim and thus that the charges are untrue.

4. Administrative Procedure: Hearings -- Evidence: Generally -- Evidence: Admissibility --Evidence: Hearsay -- Hearings -- Mining Claims: Hearings -- Rules of Practice: Evidence

Where an Administrative Law Judge found that there was sufficient evidence of the reliability of the assay certificates to justify the chief expert witness' acceptance and consideration thereof in forming his opinion, as is the recognized custom among geologists and mining engineers, no error was committed in overruling objections to admission in evidence of the assay certificates. Material, relevant hearsay is admissible in administrative proceedings.

5. Mining Claims: Contests -- Mining Claims: Determination of Validity

Where an alleged point of discovery is inaccessible by reason of caving, responsibility for restoring accessibility for purpose of mineral examination lies with contestees. In no case will the Government's mineral examiner be required to perform discovery work for the claimant, to explore beyond the claimant's exposed workings, or to rehabilitate discovery points for the claimant.

6. Mining Claims: Discovery

Where previous BLM mineral reports recited only that a valuable mineral had been discovered, but failed to include a mineral

examiner's assessment of the quantity and quality of the mineral, marketability, or costs of extraction and transportation, the decision below holding the claims invalid because of lack of discovery was correct. "Valuable mineral" is not synonymous with "valuable mineral deposit." A valuable mineral deposit is an occurrence of mineralization of such quantity and quality that a person of ordinary prudence would be justified in the expenditure of time and money in the development of a mine and the extraction of the mineral.

7. Mining Claims: Contests -- Evidence: Generally

Where mineral reports submitted in connection with a previous contest recited only that a valuable mineral had been discovered, but failed to include a mineral examiner's assessment of the quantity and quality of the valuable mineral, marketability, or costs of extraction and transportation, and where the uncontradicted opinion of the Government's witness was that the sampling method was improper, the Administrative Law Judge was correct in according little weight to the reports.

APPEARANCES: Richard G. Clemans, Esq., pro se and for appellants, Casa Grande, Arizona; Fritz L. Goreham, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Richard G. Clemans, Mrs. Richard G. Clemans, Ira W. Wagnon, Ralph Smith, and Leroy Achey appeal the decision of Administrative Law Judge Robert Mesch, dated July 13, 1978, holding six unpatented lode mining claims null and void. 1/

The proceeding was initiated by the Arizona State Office, Bureau of Land Management (BLM), at the request and on behalf of the Bureau of Indian Affairs. Pursuant to 43 CFR 4.451, BLM issued a contest complaint

1/ The contest involves the Pico Nos. 5, 7, and 8, the Pico Ace, and Sofpa Nos. 1 and 2, all located in part of the W 2 sec. 24, and extending slightly into sec. 25, T. 9 S., R. 4 E., Gila and Salt River meridian (within the Papago Indian Reservation), Pinal County, Arizona.

on September 28, 1978, charging that the instant mining claims are invalid because (1) valuable minerals have not been found so as to constitute a discovery under the general mining laws, and (2) the land within the claims is nonmineral in character. Contestees timely answered, denying the charges, and on February 28, 1978, the matter was heard by Judge Mesch as Casa Grande, Arizona.

Appellants located the subject mining claims (and others to be discussed, infra), on April 5, 1955, under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22 (1976). By Act of May 27, 1955, 69 Stat. 67, 25 U.S.C. § 463 (1976), land within the Papago Indian Reservation was withdrawn from all forms of exploration, location, and entry under the mining laws.

In 1958 two BLM geologists and a mining engineer investigated the Pico Nos. 1 through 8, Pico Ace, and Sofpa Nos. 1 through 4, as well as other claims, in connection with a dam project on the Papago Indian Reservation. By mineral report dated October 14, 1958, the mineral examiners determined that Pico Nos. 1, 2, 5, 7, and 8, Pico Ace, and Sofpa No. 2 were valid mining claims. Pico Nos. 3, 4, and 6, and Sofpa Nos. 1, 3, and 4 were determined by the mineral examiners to be invalid. The report recited only that a detailed field examination had been conducted and that seven claims were sufficiently mineralized so as to constitute discoveries. The report did not, however, contain information concerning the quality or quantity of the mineralization found within the claims.

Subsequently, separate reports recommending institution of contest proceedings against the invalid claims were prepared, on the ground that there was insufficient mineralization to constitute mining discoveries. On March 9, 1959, a contest complaint issued challenging the validity of Pico Nos. 3, 4, and 6, and Sofpa Nos. 1, 3, and 4. In its decision of May 19, 1959, the Arizona State Office held the claims invalid, with the exception of Sofpa No. 1, by reason of the owners' failure to answer the contest complaint.

With respect to Sofpa No. 1, it appears that the alleged point of discovery was inaccessible to the mineral examiners at the time of the initial examination in 1958. A further examination of Sofpa No. 1 was performed on June 3, 1959, at which time the Bureau geologists took two samples from points designated by one claimant as containing valuable mineralization. Based upon the assay results of these two samples, the geologists concluded in their June 30, 1959, mineral report that discovery had been made, and recommended withdrawal of the contest charges against Sofpa No. 1. By decision of July 16, 1959, the Arizona State Office withdrew the charges and closed the case.

On September 28, 1977, BLM, at the request of BIA, issued a contest complaint against the six unpatented mining claims of appellants.

Following denial of the charges, a hearing was held before Judge Mesch, and based on the record there established, he declared all six mining claims invalid because no valuable mineral deposit was shown to exist within the limits of any of the claims.

On appeal, appellants contend that the decision of the Administrative Law Judge is in error for several reasons, but principally on the theory that the 1958 proceeding is res judicata as to the validity of the subject mining claims, and that appellants are thus "entitled to repose." Alternatively appellants argue that the doctrine of laches precludes "a reconsideration" of the 1958 and 1959 decision. Thirdly, it is argued that the Government failed to establish a prima facie case against the instant claims. In this connection, appellants challenge the handling of the samples, the Government's failure to resample the Sofpa No. 1 ore body which was tested in 1959, and the weight accorded the testimony relating thereto.

Appellants' contention that the prior administrative proceedings are res judicata as to any subsequent inquiry into the validity of the subject claims is without merit for several reasons. Appellants cite United States v. Utah Construction Co., 384 U.S. 394 (1966), and the following language therefrom as authority for their position:

> Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. [Citations omitted.]

384 U.S. 394, 421-22.

Appellants' reliance on the above-quoted passage is, we think, misplaced. Utah Construction Co. is clearly distinguishable on its facts. That case involved a construction contract between the United States and a private contractor, the terms of which provided that concerning questions of fact arising under the contract, a decision of the Board of Contract Appeals would be final and conclusive upon the parties thereto. In the event the parties were dissatisfied with the Board's decision and thereafter brought a Tucker Act suit (28 U.S.C. § 1491 (1976), as amended, 86 Stat. 652) for breach of contract before the Court of Claims, the finality accorded administrative fact-finding by the contract disputes clause would be limited by the Wunderlich Act of 1954, 41 U.S.C. § 321 (1976), which provides

that the administrative decision remains final and conclusive in the absence of certain specified circumstances. Utah Construction Co. is hardly applicable to the case now before us.

Secondly we again state the rule that in the circumstances here presented, the actions and decisions of the Secretary of the Interior in fulfillment of his duty to protect, manage, and dispose of the public domain are not controlled by the doctrine of res judicata. Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976); United States v. Williamson, 75 I.D. 338, 342 (1968); United States v. United States Borax Co., 58 I.D. 426, 430 (1943).

The third reason is but an elaboration of the second. Of crucial significance is the fact that these claims are situated within the Papago Indian Reservation on land withdrawn from all forms of entry, location and exploration, 69 Stat. 67 supra, except those claims "validly initiated before the date of this Act and thereafter maintained under the mining laws."

[1] When land is withdrawn subsequent to location of a mining claim, the validity of such claim can not be recognized unless (1) it was perfected by a discovery at the time of withdrawal, 2/ and (2) it has been continuously supported by the same discovery to the present; that is, at the time of the hearing. United States v. Gunsight Mining Co., 5 IBLA 62 (1972); United States v. Pulliam, 1 IBLA 143 (1970); United States v. Houston, 66 I.D. 161 (1959). In other words, there are two events with which a claimant in such circumstances must be concerned: the first being the effect, if any, of withdrawal of the land; the other being any subsequent inquiry into the validity of unpatented claims as required by the general mining laws.

[2] The 1958-59 proceeding merely established that appellants' possessory interests in the mining claims had not been extinguished by the Act of May 27, 1955, supra. Appellants did not then seek patents. Unless and until a patent issues, title to the claims in controversy remains in the United States, and it may inquire into the extent and validity of rights claimed against it. Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 430 (1920); Ideal Basic Industries, Inc., supra.

We hold also that the doctrine of laches is inapplicable. 43 CFR 1810.3.

2/ This requirement of perfection at the time of withdrawal is unaffected by discoveries made at times prior thereto. Gunsight Mining Co., supra.

[3] We turn finally to appellants' argument that the Government failed to establish a prima facie case against the claims. We reiterate the standard to be applied in determining the sufficiency of the Government's case: the mining claimant bears the burden of proof or risk of nonpersuasion as to the validity of the claim, and when the Government contests the validity of a mining claim, it has only the burden of establishing a prima facie case. The burden of going forward then shifts to the contestee, who is the proponent of a claim or right against the United States, to adduce evidence which by a preponderance affirmatively demonstrates the validity of the claim and thus that the charges are untrue. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). The evidence is summarized as follows.

The Government called two independent consulting geologists and a BLM mining engineer, each of whom was qualified as an expert witness. The subject mining claims were examined on four occasions: August 24, 25, and 30, 1976, and on February 3, 1977. Six samples were obtained in August 1976, and three samples were taken in February 1977. In addition, 20 assay results obtained and supplied by one of the claimants were reviewed and considered by the Government's chief witness. Based upon the aforesaid mineral examinations and the assay results for gold, silver, and lead, that witness concluded that the claims were not such as would justify a person of ordinary prudence in further expenditure of time and money in the reasonable prospect of success in developing a paying mine on any of the six claims in issue. The record herein indicates that this conclusion was based upon the witness' opinion that the value of the small tonnages available from small sinuous pockets of mineralization would be insufficient to cover the base cost of smelting alone, without consideration of the costs of mining and transportation.

Regarding the evidence and testimony above summarized, appellants objected to receipt in evidence of the assay certificates of eight of the nine samples obtained by the geologists, on the ground that the assayer was not present at the hearing and subject to cross-examination. Appellants also objected to the assay results of five of those eight samples on the ground that the person who actually delivered the samples to the assayer on behalf of the geologists was not present for cross-examination. The objections were overruled and the certificates admitted in evidence. No error was committed in so ruling.

The objection pertaining to actual delivery of the samples, raised by appellants for the first time in their posthearing brief, lacks significance. Based upon all the evidence, Judge Mesch concluded that no serious question exists as to whether the samples assayed were in fact those obtained from the mining claims in controversy. While the mineral examiners did not personally deliver

the samples, one Mr. Robb prepared the receipt for the samples to be assayed at their direction and pursuant to established office procedure. He was actually seen leaving the office with the samples by at least one of the Government's witnesses. The assayer's offices are located across the alley from the geologists' offices, approximately 100 feet away.

[4] Judge Mesch also found that there was sufficient evidence of the reliability of the assay certificates which justified the chief expert witness' acceptance and consideration of the documents in forming his opinion according to the recognized custom among geologists and mining engineers. Brown v. United States, 375 F.2d 310 (D.C. Cir. 1967); see also Federal Rules of Evidence, R. 703. Material, relevant hearsay evidence is admissible in administrative proceedings. 5 U.S.C. § 556(d) (1976); Casey Ranches, 14 IBLA 48, 80 I.D. 777 (1973). We note also that the witness' opinion was based in part on the assay results obtained and furnished by one of the claimants.

[5] One last contention can be dealt with summarily. Appellants complain of the Government's failure to resample the ore body within Sofpa No. 1 which in 1959 resulted in withdrawal of contest charges. "In no case will the Government's mineral examiner be required to perform discovery work for the claimant, to explore beyond the claimant's exposed workings, or to rehabilitate discovery points for the claimant." United States v. Woolsey, 13 IBLA 120, 123 (1973); United States v. Kelty, 11 IBLA 38 (1973); United States v. Lease, 6 IBLA 11 (1973). The point of alleged discovery within Sofpa No. 1, examined in 1959, was in a tunnel which has caved, making it dangerous to enter. Appellants made no effort to restore this working so that it was accessible for examination and sampling. It is thus quite apparent, and we so hold, that the Government established a prima facie case of lack of discovery.

As previously noted, appellants' case consisted of the 1958 and 1959 mineral reports submitted in the earlier contest. The 1958 report concluded that all the claims, except Sofpa No. 1, were valid because the mineral examiners found "sufficient mineralization to constitute valid mineral discoveries." The supplemental 1959 report covering Sofpa No. 1 concluded, based upon the high assay results of the two samples obtained, that a "discovery of valuable mineral * * * has been made."

[6] We agree with the Judge below that "a valuable mineral" is not synonymous with "valuable mineral deposit." Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); Henault Mining Co. v. Tysk, 419 F.2d 766 (9th Cir. 1969); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968). A valuable mineral deposit is an occurrence of mineralization of

such quantity and quality that a person of ordinary prudence would be justified in the expenditure of time and money in anticipation of the development of a valuable mine. United States v. Coleman, 390 U.S. 599, 602 (1968); Chrisman v. Miller, 197 U.S. 313, 322 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894).

[7] We find no error in the weight apparently accorded these documents. Neither report contains an assessment of the quantity and quality of the "valuable mineral," nor do they include information regarding the costs of extraction and marketing. We note, moreover, that one expert seriously questioned the propriety of the method utilized in 1959 to obtain samples of Sofpa No. 1, as well as the accuracy of the high assay results. His opinion that such assay results were not representative if the sampling method described in the report was actually employed, was uncontradicted. However, assuming arguendo that the sampling method was in fact proper and that the assay results were also accurate, in our view such assumption only raises the question of why appellants have not in the intervening years developed and mined the deposit.

The evidence of the contestees viewed in its best light cannot be considered to have preponderated over that presented by the Government. Accordingly, we find that the decision below was correct in determining that the claims in controversy are null and void, there being no discovery within the purview of the general mining laws.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

James L. Burski
Administrative Judge